# Legal history

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# I. Plurality and the Traditions of Swiss Legal Culture

If we look for defining elements of Swiss legal culture – for the totality of Swiss legal rules, for the political, social, and economic preconditions of their creation and application, and for the references to different collective processes of creating sense for these phenomena – there appears to be at least two defining features. Certainly, one distinguishing feature is the *internationality* of the Swiss legal order, in terms of the strong Swiss commitment to international rules and international organisations, although there of course remains strong opposition against such internationalisation. Another defining characteristic – which shall be the conceptual starting point of this chapter – is the importance of *plurality*. Switzerland has four official languages (Article 4 Federal Constitution)[1], and places a strong, if not defining importance on cantons and their cultures as making up the Swiss confederation (Article 1 Federal Constitution, see also Article 3 Federal Constitution). Further, considering the importance of the municipal level in daily legal practice, the Swiss legal order can be regarded as structurally pluralistic. This relates to the connection of different cultural areas and traditions as embodied in the sometimes-complex relationship between the great Swiss regions (West, East and South) and their various cultural traditions. As a consequence, Swiss legal culture is also defined by the mechanisms and concepts it utilises to manage, coordinate and mediate these pluralities. For example, the idea of the Swiss "*Willensnation*", i.e. a nation which rests on their members will,[2] was an important conceptual element in defining the unity of the Swiss people as acting entity in the federal constitution. This corresponds with the strong presence of the idea of popular sovereignty as an integrating element in Switzerland: Direct democracy is a pivotal element of Swiss legal culture,

1 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution www.admin.ch (https://perma.cc/M8UJ-S369).

2 In greater depth on the evolution and cultural function of this concept Oliver Zimmer, A Contested Nation: History, Memory and Nationalism in Switzerland, 1761–1891, Cambridge 2007, pp. 151, pp. 207.

because it is perceived to be a particular strong device of expressing the will of the people. Another means of coordinating plurality by mediating conflicts of different interests and regions is provided by certain features of Swiss legal tradition. These elements have developed over the course of Swiss legal history, in particular on the confederate and federal level. Their emergence and evolution shall be addressed in this chapter. However, only specific aspects of Swiss legal tradition shall be discussed.

For the purposes of this survey, two larger periods shall be addressed. The first period includes the history of the so-called *Old Confederacy* from the 13th/14th century to 1798, while the second stage is defined by the emergence of the modern *Swiss constitutional welfare state*. In what follows, it shall be argued that the legal history of the Old Confederacy was particularly defined by strong traditions of autonomous rulemaking by means of covenants and customary law, albeit that decrees have been gaining increasing importance since the 16th century (II.). In a second step, the importance of constitutions and codifications as defining elements of lawmaking in the modern Swiss state shall be discussed (III.). The emergence of internationality as part of the tradition of Swiss legal culture is subject of the following chapter.

# II. The Old Confederacy (13th/14th Century – 1798)

## 1. Coniuratio, Covenants, and Charters

The Swiss federal constitution uses inter alia the term *Schweizerische Eidgenossenschaft* to describe the Swiss federal state (besides the words *Confédération suisse/Confederazione Svizzera/Confederaziun svizra*). With the elements *Eid* (oath) and *Genossenschaft* (fellowship), this descriptor is a reminder of the long-lasting tradition of the autonomous organisation of the Swiss regions, based on mutual oath. Since at least the 13th century, these alliances have formed the basis of the Old Swiss Confederacy. Around 1291 (although maybe not until 1309) "*all people of the valley community of Uri, the entirety of the Schwyz valley and the community of people from the lower Unterwalden valley*" promised to "*assist each other by every means possible with every counsel and favour, with persons or goods within their valleys and without, against any and all who inflict on them or any among them acts of violence or injustice against persons or goods*".[3] From the 15th century onwards, this charter and its formulae would become part of a historiographic narrative of a continuous efforts and struggle of liberation and resistance against foreign enemies. Around the same time a similar motive emerged with the legend of an oath, taken by William Tell and others as part of their resistance against foreign powers. This legend, which has become famous by its literary adoption in Friedrich Schiller's play "William Tell", and the charter, discussed here, merged since around the late 19th century to a collective, national narrative about the foundation of the Swiss nation.

3 The Federal Charter of 1291, Preamble; the English translation follows the proposal by the *Bundesbriefmuseum*, online available at www.admin.ch (https://perma.cc/WB95-DKAD).

Both regarding its topic and its basis of validity as an oath, taken by all its associates, this covenant represented a typical legal phenomenon of the High and Later Middle Ages. This phenomenon was that of public peaces (*Landfrieden*): these were a kind of sworn multilateral agreement between arms bearing persons, i.e. nobles or free peasants as opposed to villeins with obligation to render personal services or to pay duties, carrying the obligation to maintain peace and enforce common rules, as they were established by these public peaces.

The conceptual basis of these public peaces was the idea of creating associations based on collective vows. This kind of association was called sworn union (*coniuratio*). In a period lacking an overarching governmental power, as embodied in state and statehood during Roman antiquity and since the early modern period in Europe, the sworn union was in particular present in regions without strong royal or noble dominion,[4] as a basic means of social and moreover political self-organisation, which enjoyed binding force by virtue of autonomously created legal normativity.

Sworn union, public peaces, and covenants were also key instruments in developing further coordination and cooperation in the Switzerland of today.[5] Two lines of development can be distinguished. Firstly, under a network of treaties developed up until 1513, a complex confederate structure between the cantons (then so-called *Orte*) and associated cantons (*zugewandte Orte*) emerged. By way of military expansion and annexation, this group of cantons enlarged its territory by common dominions (so-called *gemeine Herrschaften*) without any kind of membership status. Secondly, several so-called charters (*Briefe*), whose validity was based on the idea of sworn union (*coniuratio*) and public peaces (*Landfriede*), consolidated the organisational structures of the emerging confederacy: the Treaty on Clerics 1370 (*Pfaffenbrief*)[6] between Zurich, Luzern, Uri, Schwyz, Unterwalden, and Zug banned feud and thus violent conflict and excluded ecclesiastical jurisdiction from the territory of the associated partners. In these rules, the concept of jurisdictional

4 For a very short, but coherent survey see Karl Ubl, Corporate Order, in Brill's Encyclopedia of the Middle Ages (https://perma.cc/K4JU-NDSN).

5 For an outline of this period in Swiss history see Clive H. Church/Randolph C. Head, A Concise History of Switzerland, Cambridge 2013 (6th printing 2017), pp. 22; Roger Sablonier, The Swiss Confederation, in Christopher Allmand (ed.), The New Cambridge Medieval History, vol. 7, Cambridge 1998, pp. 645, online available at www.cambridge.org (https://perma.cc/C7WY-UUGA).

6 Church/Head, p. 31.

territorial closure found a typical normative concretisation. The Sempach Treaty of 1393 (*Sempacherbrief*)[7] both confirmed and amplified the combination of public peace and confederacy. As a peace treaty between Uri, Schwyz, Unterwalden, Luzern, Zurich, Glarus, Zug, and Bern as well as Solothurn, this charter banned violence between the signatories, ordered peace between them during joint military operations and also banned solo military actions by individual allies. Eventually, the Compact of Stans 1481 (*Stanser Verkomnis*) between Uri, Schwyz, Unterwalden, Luzern, Zurich, Glarus, Zug, and Bern, as well as Freiburg and Solothurn confirmed the former conventions.[8] Moreover, the Compact of Stans established a duty to provide mutual assistance against external enemies as well as to combat revolts. It also committed the allies to common warfare. Parallel to this formation of confederate structures, the Federal Diet (*Tagsatzung*) as central council emerged since 1415 and in a more consolidated structure since 1470. It coordinated the common interests of the confederates: in particular foreign policy matters, questions of common economic politics and policy, and the joint administration of the common dominions.[9]

## 2. Customary Law, Records of Law, and Sumptuary Mandates

The sworn union (*coniuratio*) as a concept for the formation of associations was also dominant on the municipal level.[10] Here, the laws of free municipalities and cities, emerging since the 12th century in Switzerland, were based in their validity on an oath made by the citizens. The Zurich Charter of rules for judgement (*Richtebrief*) for example, which was laid out in written form for the first time in 1304, starts by describing itself as "*book of laws of the citizens of Zurich*", which the citizens of Zurich "*have set up by peace and for the honor*

7 Church/Head, p. 33.

8 Church/Head, pp. 58, Sablonier, pp. 662.

9 On the latter aspect see Randolph C. Head, Shared Lordship, Authority and Administration: The Exercise of Dominion in the *Gemeine Herrschaften* of the Swiss Confederation, 1417–1600, in Central European History, Volume 30, Issue 4, Cambridge 1997, pp. 489, available online at www.cambridge.org (https://perma.cc/736U-JHCV).

10 As a survey see Sablonier, pp. 656.

*of the city by themselves*".[11] The rootage of legal validity in the idea of oath became even clearer in another Zurich municipal law of 1336, which declared every action against itself or other articles of municipal law to be "*perjury*".[12]

There were, however, also other legal sources present. In a society with only a limited range of literacy (with the exception, of course, of the ecclesiastical culture, which was basically defined by its deep commitment to literacy and textuality), naturally there was great importance placed on orality and thus unwritten law, as represented by customary law. This phenomenon was also present in medieval Swiss legal culture: particularly in rural areas, customary law, considered as such based on long-term use of rules, governed apparently in the most cases social and economic relations.

There was, however, an increasingly emerging need to establish these rules in written form so as to create a basis for reliable expectations. Consequently, the so-called "*Offnungen*" (literally: "disclosure") emerged. In principle, they claimed to be merely written records of long existing non-written rules, governing in particular the relations between peasants and their lords, between free peasants (with regard to the use of common municipal goods, for example woods, meadows, or lakes), and between lords. A document created around 1300, for example, regarding Pfäfers Abbey claimed to be a list of "*the rights and powers of the Lord's house of Pfaevers, which it has from ancient times on all things, over people and goods*".[13] In reality, however, *Offnungen* usually

11 Original: Züricher Richtebrief 1304, Introduction, II.21, in: Daniel Bitterli (ed.), Die Rechtsquellen des Kantons Zürich, Neue Folge, Erster Teil, Erste Reihe, Erster Band, Zurich 2011 (online available at www.ssrq.ch (https://perma.cc/68ND-6ATQ), p. 1: „*Hie vahet an das buoch der gesetzeden der burger von Zurich … D]ise gesezeden, die an disem buoche geschriben sint, hant die burger von Zurich dur vride und dur besserunge der stat ze eren und in selben uf gesezet.*"

12 First Sworn Compact, *Erster Geschworener Brief* 16th July 1336, in: Werner Schnyder (ed.), Quellen zur Zürcher Zunftgeschichte, vol. 1, Zurich 1936, n. 3, pp. 8, section y: Who violates the rules of the compact, „*der sol meineidig sin und sol sin burgrecht verlorn han und sol dar zu Zurich in die stat niemer mere komen*".

13 Original: Sammlung Schweizerischer Rechtsquellen, XIV. Abteilung: Die Rechtsquellen des Kantons St. Gallen, 3rd part: Die Landschaften und Landstädte, vol. 2: Die Rechtsquellen des Sarganserlandes, by Sibylle Malamud/Pascale Sutter, Basel 2013, no. 8, pp. 6, online available at www.ssrq.ch (https://perma.cc/6DJJ-QU5S), p. 7: „*Dis sint des gotzhuses von Pfaevers rehtungen, die es von alter behebt an allen sachen, uber lút und úber gût*".

represented the result of negotiations about claims, duties, and rights between all participants, and were largely based on consensual action.[14]

Customary law and its transformation into written law could also be observed in cities and larger regions. Here, the term "law of the city"/ "law of the land" was used, which essentially referred to the sum of unwritten or only partially written rules that governed the city or the region. A typical example demonstrating the strong presence of the concept of customary law would be the liberties, rights and customary laws of Vaud (*Libertez, Franchises et Coustumes … du Pays de Vauld*). These were compiled by decree of the Bern dominion in 1577 and in 1616 were transformed into the so-called laws and statutes (*Loix et statuts*). This change of title also indicated a trend in the history of secular Swiss legal sources in the transition from the late middle ages to the early modern period: the increasing importance of statutory legislation enacted by superiors – usually urban councils and cantonal governments.

"The sumptuary law" (*Sittenmandat*) represented a particularly wide spread type of legislation during the 16th and the 17th centuries. These sumptuary laws were intended to establish a broad range of economic and in particular social regulation, ranging from price-caps intended to protect those on low income against poverty to topics like alcohol consumption during marriage or the ban of luxury goods. In laws such as the "Statutory mandate and order of our gracious lords, mayor and small and grand council of Zurich" 1650, the rise of legislative and governmental power indicated the emergence of early modern statehood with its wide-ranging claim of power. It was inter alia this kind of development that would find a strengthened continuation in the period following the French Revolution.

14 On the whole issue see Simon Teuscher, Lords' rights and peasant Stories: Writing and the Formation of Tradition in the later Middle Ages, translated by Philip Grace, Philadelphia 2012.

# III. The Rise of Modern Swiss Statehood since 1798

## 1. Constitutional Developments in Europe

Since the French Revolution of 1789, the idea of constitutionalism – the concept of the constitution as (written) legal order for governmental and political power, which was in principle beyond unilateral disposition by the government or a single ruler – spread throughout Europe. In several stages – particularly in the aftermath of the Vienna congress 1814/1815 with its grant of so-called estate constitutions (*Landständische Verfassungen*) in the member states of the German Confederation, as a reaction to the French revolution 1830, and in the course of the middle European revolutions of 1848/1849 – Constitutions became the longer the more a key part of the identity of statehood in Europe.[15]

Since towards the latter third of the 19th century, another feature gained increasing importance for the practice of states and governments.[16] As a consequence of the social and economic turmoil caused by rapidly spreading industrialisation, states began to intervene with increasing intensity into economic as well as social structures and orders. These interventions were embodied in the creation of social security systems and their cost allocating

15 As a survey on these developments in Europe see for example the contributions in Kelly L Grotke/Markus J Prutsch (eds.), Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences, Oxford 2014, online available at www.oxfordscholarship.com (https://perma.cc/H4VQ-TREF). As an exemplary account of these developments with reference to Germany see Michael Stolleis, History of Public Law in Germany, 1800–1945, New York 2001; Michael Stolleis, A History of Public Law in Germany, 1914–1945, Oxford 2004.

16 For an overall survey see Jörn Leonhard, The Rise of the Modern Leviathan: State Functions and State Features, in: Stefan Berger (ed.), A Companion to Nineteenth-Century Europe, Oxford 2006, pp. 137, online available at Wiley Online Library (https://perma.cc/GV78-VFJ7).

mechanisms.[17] Similar effects were created by a new kind of tax legislation, particularly the income taxation and new types of wealth taxation. These were not only a mechanism intended to provide the state with the required financial resources; they also frequently followed political agendas of redistributing national wealth by means of taxes.[18] At the same time, public services in transportation and energy emerged, which were provided by states and cities and thus obviously enhanced the range of public responsibilities.

This emerging constitutionally-ordered interventionist welfare state mainly used two instruments to implement its power: legislation (including codification) and a newly professionalised administration with wide-ranging enforcement powers.

These developments and phenomena would also occur in Swiss legal and constitutional history after 1798.[19] Given the spatial limitations of this text, it is only possible to offer a short outline of Switzerland's constitutional history (below 2.), and another short outline of the Swiss history of codification (below 3.).

## 2. Constitutional Developments in Switzerland since 1798

A Swiss constitutional history expert has differentiated between three stages of statehood and conceptions of government notable since 1798.[20] The first period was characterised by the rule of law with a strong emphasis on individual freedom (bourgeois constitutional state; *bürgerlicher Rechtsstaat;*), perceivable until 1848/1874. This was followed by a strong increase in governmental intervention and the rise of the idea of the social state (*Interventions- und Sozialstaat*) between World War I and the latter third of the 20th century. Since then, the idea of prevention and maintaining security (prevention state*;*

17 As a survey with regard to Germany see Michael Stolleis, History of Social Law in Germany, Berlin/Heidelberg 2014, online available at Springer Link (https://link.springer.com/book/10.1007%2F978-3-642-38454-7), pp. 29.

18 See the contributions in: José Luís Cardoso/Pedro Lains (eds.), Paying for the Liberal State, The Rise of Public Finance in Nineteenth-Century Europe, Cambridge 2010, online available www.cambridge.org <https://doi.org/10.1017/CBO9780511845109>.

19 As survey on modern Swiss history in English language see Church/Head, p. 104 with further reference.

20 Andreas Kley, Verfassungsgeschichte der Neuzeit, Grossbritannien, die USA, Frankreich, Deutschland und die Schweiz, 3rd edition, Bern 2013, pp. 259, pp. 426.

*Präventionsstaat*) has gained increasing importance. In fact, the development of constitutional statehood in Switzerland has corresponded with this evolutionary scheme, as shall be argued in what follows, with a particular focus on the federal constitutional order.

## a) Focusing on Individual Rights: The "Bürgerliche Rechtsstaat"

In 1798, the age of the Old Confederacy ended with the invasion of French troops and the foundation of the Helvetic Republic.[21] The new state adopted the constitutional features that were typical for states under French dominance: in a centralised state there was no longer room for autonomous cantons. On the contrary, "*there is no longer any border between the cantons and subjected lands nor between one canton and another.*" Instead the "*unity of the home country and of the general public interest*" would substitute the "*weak bond*" between different "*pieces*".[22] This experiment, however, failed due to the heavy resistance by a large part of the people. The success of this resistance was proven by the so-called *Mediation* in 1803, which received its name by virtue of the Act of Mediation (*Acte de mediation*), which by and large restored the pre-revolutionary confederate structure, establishing 19 cantons with constitutions of their own. Following Napoleon's defeat in 1814/15, however, the political foundation of this order broke away. Instead, in 1815 the so-called Federal Treaty (*Bundesvertrag/Pacte fédéral*) conceptualized as a treaty of international (and not domestic) law between 22 sovereign cantons, understood as independent states, with the main purpose of securing "*their freedom, independency and safety*" and maintaining public peace "*inside*" this confederation.[23] It was indicative of the restorative intention of this treaty that

21 Mark Lerner, A Laboratory of Liberty: The Transformation of Political Culture in Republican Switzerland, 1750–1848, Leiden 2012, online available at Brill Online (https://perma.cc/2JLL-9AEW).

22 Constitution of the Helvetic Republic of 12 April 1798, Article 1, paragraph 2; Original: „*Es giebt keine Grenzen mehr zwischen den Kantonen und den unterworfenen Landen, noch zwischen einem Kanton und dem andern. Die Einheit des Vaterlandes und das allgemeine Interesse vertritt künftig das schwache Band, welches fremdartige, ungleiche, in keinem Verhältnisse stehende, kleinlichen Lokalitäten und einheimischen Vorurtheilen unterworfene Theile zusammenhielt und auf's Gerathewohl leitete.*"

23 Original: Bundesvertrag zwischen den XXII Cantonen, 7th August 1815, in: Offizielle Sammlung der das Schweizerische Staatsrecht betreffenden Actenstücke, der in Kraft bestehenden Eidgenössischen Beschlüsse, Verordnungen und Concordate, und der

federal politics were once again coordinated by the Federal Diet as the main federal institution.

Another correspondence of the Federal Treaty to the pre-revolutionary dynamics of Swiss constitutional history might be noted in the fact that the following decades would be characterised not by constitutional developments on the federal level, but within the cantons. Here, particularly from 1830, in a period called *Regeneration*, constitutions were established in eleven cantons like Bern, Ticino, St. Gallen, Fribourg, or Zurich;[24] these were shaped by liberal concepts such as the expansion of voting rights, the separation of powers and the requirement for legal authorisation of governmental intrusion into individual rights, which, at least in cases like the State Constitution of the Confederate Canton Thurgau (*Staatsverfassung für den eidgenössischen Stand Thurgau*), introduced "*full freedom of work, acquisition, and commerce*".[25]

The mainly liberal movement behind these constitutionalising efforts met, however, increasing opposition. The failure of the liberal project to revise the federal treaty in 1833 was telling in this regard. The rising tensions between a group of liberally dominated cantons and a group of more conservatively shaped cantons were in part driven by clashing cultures: an urban, bourgeois, liberal culture on the one side, and a rural, more conservatively-shaped group of cantons on the other. These tensions were only worsened by the previously latent but continuously intensifying conflict between Protestantism and Catholicism. As a consequence, Swiss politics in general and Swiss constitutional politics in particular (in a manner following the same path of development as that in Germany society) became confessionalised: the Protestant side was mainly (albeit not exclusively) linked to the liberal movement, while the Catholic side became increasingly conservative.

These tensions eventually erupted into a short but nevertheless violent conflict in 1847, which ended with the defeat of the conservative-Catholic Special Alliance (*Sonderbund*).[26] A result of these confessional antagonism was to a

zwischen der Eidgenossenschaft und den benachbarten Staaten abgeschlossenen besonderen Verträge, Zurich 1820, online available (https://perma.cc/2EMX-T5NY), pp. 3, p. 3: „*Die XXII souveränen Cantone der Schweiz … vereinigen sich durch den gegenwärtigen Bund zur Behauptung ihrer Freiheit, Unabhängigkeit und Sicherheit gegen alle Angriffe fremder Mächte, und zur Handhabung der Ruhe und Ordnung im Innern.*"

24 For Zurich see as a seminal account Gordon A. Craig, The Triumph of Liberalism: Zurich in the Golden Age, 1830–1869, New York 1988.

25 Article 12 of the State Constitution of the Confederate Canton Thurgau of 14 April 1831: „*Alle Bürger des Cantons genießen volle Arbeits-, Erwerbs- und Handelsfreiheit.*"

26 Joachim Remak, A very Civil War: The Swiss Sonderbund War of 1847, Boulder 1993.

certain extent also represented by the Federal Constitution of 1848,[27] which the cantons of Uri, Schwyz, Nidwalden, Obwalden, Zug, Valais, Ticino, and Appenzell Ausserrhoden rejected in cantonal popular votes during July and August (even though these rejections would not bear any consequence for the overall validity of the new federal constitution). Nevertheless, this contested constitution established a federal state with the Federal Assembly (consisting of two chambers), the Federal Council as federal government and a federal court (although it did not act as permanent institution). The federal legislative powers were quite limited, with the cantons still in charge of the rules on commerce, financial transactions, and education. The largely cantonal responsibility of upholding the rights of the people in Switzerland was also mirrored by a small catalogue of federal individual rights, which primarily guaranteed the equal rights of all Swiss citizens in all cantons. The explanation for the limited federal protection was the perception that the cantonal level ensured strong constitutional protection of individual rights.

However, with the expansion of industrialisation and with the increasing growth of production and economic transaction throughout Switzerland, efforts to strengthen the central state gained traction and resulted in a so-called total revision of the federal constitution in 1874.[28] The new constitution widened federal legislative powers and, as a means to protect individuals against a strong federal legislator state, federal individual rights like economic and religious freedom were introduced, protected by a permanent Swiss Federal Supreme Court with jurisdiction for inter alia cases concerning the violation of constitutional rights of individuals. As a consequence, the constitution of 1874 moved the jurisdictional protection and enforcement of of individual freedom de facto from the cantonal to the federal level. Nevertheless, the cantonal constitutions remained in force, but they were – as already stipulated by the 1848 constitution – required to respect federal constitutional rules. This included also the federal fundamental rights of the federal constitution, which were thus protected even against the rules of cantonal constitutional law.

A further important step in the evolution of federal statehood was the introduction in 1891 of the popular initiative for revisions of the Federal

27 The Federal Constitution of the Swiss Confederation, September 12, 1848 with Article XLI and XLVIII as amended January 14, 1866, Bern 1867, online available at Internet Archive (https://archive.org/details/federalconstituooswitgoog).

28 Adopted on 29th May 1874, English text online available at www.servat.unibe.ch (https://perma.cc/ZZD6-ATDW).

Constitution. With this provision, the concept of direct democracy became a key part of the federal constitutional order. At this point, the idea of a Swiss nation – united not only by tradition, history, common symbols and signs, but also by rules expressing its common constitution-creating will – received legal force.

## b) The (Slow) Rise of the Interventionist State

Federal administrative powers were limited by the end of the 19th century, with administrative tasks mainly being executed at cantonal level. Nevertheless, with legislative acts like the Federal law about military insurance 1901 and with the establishment of the Federal Social Insurance Office (starting its activities in 1913),[29] the first elements of interventionist statehood began to emerge on the federal level as well. During World War I and particularly World War II, these interventionist tendencies gained increasing strength, given the efforts of governments and administrations to adapt the Swiss economic order to the demands of the political landscape. An important precondition for such action was a fundamental constitutional change, which had occurred for the first time in August 1914: under the impression of an existential threat, the Federal Assembly granted the Federal Council unlimited authority to take every measure to secure the integrity as well as the borrowing power and the economic interest of Switzerland. This authorisation was valid until 1921, but in 1939, when World War II broke out, the Federal Assembly granted the Federal Council a similar extent of authority again. The Federal Council would use these powers extensively in the years that followed by issuing numerous decrees without having authorisation in existing laws or the constitution. Even though this so-called regime of full powers (*Vollmachtenregime*) experienced fierce criticism after 1945, it lasted until 1952.

However, during and after the renaissance of parliamentarian and direct democratic order the tendency towards stronger economic regulation continued: for example, the adoption of the so-called articles on economic order (*Wirtschaftsartikel*) in 1947, which authorised the confederacy to take action to increase the "*welfare of the people*" and for the "*economic protection of the citizens*". If justified by the "*overall interest*" the confederacy was authorised

29 For an overall account Matthieu Leimgruber, Solidarity without the State? Business and the Shaping of the Swiss Welfare State, 1890–2000, Cambridge 2008/2011.

to issue rules "*if necessary in divergence from economic freedom*".[30] In the following years, however, these provisions remained more promise than an actual starting point for legislative action. In fact, the concept of self-regulation remained as the guiding principle of the Swiss law for the economic system until the 1980s. Only after the worldwide economic crisis in the middle of the 1970s did the ideas of consumer protection, an effective antitrust law and a stronger oversight over financial markets gain influence and become realised in legislation. Moreover, social security became a cornerstone of the Swiss legal order as of 1947. This was due to the adoption of the law for the old-age and survivors' insurance. This was even more the case after the expansion of mandatory social insurance contributions including mandatory health insurance, introduced in 1996.

## c) Towards the Prevention State

It was nevertheless telling of the reluctance of a still strongly liberal-dominated legislative body that, in particular in the field of financial regulation, stronger mechanisms of oversight were only established in Switzerland after the almost deadly collapse of a major Swiss bank in 2008 during the worldwide financial crisis. However, the new laws on financial regulation were also proof of another, more recent development of rulemaking and constitutional evolution: in particular, the new Swiss law on financial regulation was driven by concerns over potential damage resulting from risky actions taken by finance-market actors. This perspective, particularly influenced by considerations of the future in general and risk in particular, marked a transition that has shaped governmental as well as administrative and legislative action since around the last third of the 20th century, with some developments even perceivable in the middle of the century. The "*colonisation of the future*"[31] by *prevention* emerged in the Swiss federal constitution (thus beyond mere

30 Article 31bis: "(1) *Within the limits of its constitutional powers, the Confederation shall take measures to promote the general welfare and the economic security of its citizens. … .* (3) *Where this is justified by general interest, the Confederation is entitled to enact regulations departing, if necessary, from the principle of freedom of trade and industry in order to: a) preserve important economic sectors or professions whose existence is threatened and to improve the skills of persons exercising an independent activity in those sectors or professions*".

31 See Anthony Giddens, Modernity and Self-identity: Self and Society in the Late Modern Age, Stanford 1991, p. 122; on the context of this term and his importance for legal history research see Andreas Thier, Time, Law, and Legal History – Some Observations and

insurance law) through measures like planning. It also became visible with the state taking over decisions about certain types of risks like the circulation of new technologies, pharmaceuticals, or, as in the case of the financial markets, types of financial transactions and trading. Federal powers for legislation on nuclear power, for environmental protection, or for the law of city and regional planning were established by constitutional amendments. This development, which has continued under the 1999 revised Federal Constitution,[32] has in part resulted in an expansion of federal administrative law, the establishment of new federal jurisdictional institutions like the Federal Administrative Court and an abundant series of changes of the rules in criminal procedure, for police actions, on preventive custody, or on the intelligence service.

Nevertheless, the cantons, tasked inter alia with the application and execution of most of the federal administrative rules, have retained an important position as points of reference for regional collective identities. On the legislative level, these identities particularly find their expression in a vivid cantonal constitutional culture. In this regard, the rise of cantonal constitutionalism since the first third of the 19th century is still imprinted on the Swiss legal order of today. Another part of cantonal legal culture, namely the cantonal codifications of private, criminal, and procedural law, has, however, been replaced by federal legislation. But the history of codification is not only an example of the evolutionary patterns of Swiss legal culture in post-modern times. It also demonstrates the strong impact of foreign legal culture on legal evolution within Switzerland, as we shall examine in the following paragraph.

## 3. The Rise of Codifications in Swiss Legal Culture

Codifications of laws have emerged as an increasingly vital part of the Swiss legal order. The idea of establishing a systematic order for a defined area of law, e. g. civil law, through legislation with exclusive validity has been part of the European legal tradition at least since the age of Justinian I (527–565 AD) and his Codex of 529/534. The history of modern codifications begins in the 18th century with law books like the General State Laws for the Prussian States

Considerations, in: Rechtsgeschichte – Legal History Rg 25 (2017), pp. 20 (https://perma.cc/T8Q2-JUHR), pp. 29, 34 with further reference.

32 See the chapter on Constitutional Law, pp. 138.

1794 (*Allgemeines Landrecht für die Preußischen Staaten*). In Switzerland, two stages of codification efforts can be distinguished: a period of cantonal codifications, beginning in the early 19th century (e. g. Criminal code of the republic and canton Ticino 1816 [*Codice penale della republica e cantone del Ticino*], Civil Law Code in Zurich 1853–1855 [*Privatrechtliches Gesetzbuch*], was followed as of 1874 by a series of federal codifications including the Law of Obligations 1881 [*Obligationenrecht*] and the Code of Civil Law 1912 [*Zivilgesetzbuch*], or the Code of Criminal Law of 1937 [*Strafgesetzbuch*], which is in force since 1942).

These codifications and their history reveal another defining element of Swiss legal culture which has recently become even more important. This is that legislators in cantons and on the federal level frequently adopted concepts and structures of rules from other, foreign traditions. In general, three layers of legislation with foreign provenance would influence Swiss codifications in the 19th and 20th centuries. In the 19th century, it was particularly the German Historical School of Roman law, as established by Friedrich Carl of Savigny (1779–1861) and transferred at first to the German speaking academic discourse by Savigny's Swiss master student Friedrich Ludwig of Keller (1799–1860), whose doctrines influenced not only the codification of law, but also academic education in law. Fundamentally, Savigny, Keller, and other members of the Historical School of Roman law argued that Roman law texts and doctrines formed a point of reference for legal ideas and reflection about the ideal structure of law. Particularly the law of obligations and large sections of cantonal property law followed the lines of Roman law (like the aforementioned Civil code for the canton of Zurich [*Privatrechliche Gesetzbuch für den Kanton Zürich*] and the codifications drawing from it [the so-called Zurich group], as well as the Law of Obligations of 1881 [*Obligationenrecht*]). It was also telling that codifications like the *Zivilgesetzbuch* 1912 followed in overall structure the scheme in the Institutiones of Gaius (person, things, actions*; personae, res, actiones*) with its sequential arrangement of the law of persons, family, succession, and property. The impact of the Austrian General Civil Code of 1811 (*Allgemeines* Bürgerliche*s Gesetzbuch*) was particularly strong in the so-called Bern group, which was dominated by the Civil Code of city and republic of Bern 1825–1831 (*Civil-Gesetzbuch für die Stadt und Republik Bern*). The French Civil Code of 1804 (*Code civile*) also had a particularly strong impact on the Western Swiss regions as well as in the canton of Ticino, where legislators adopted the Napoleonic law book (albeit usually with changes and adjustments to reflect their own specific needs) as it was done for example

in Fribourg 1834–1850. Similar developments occurred in criminal law; for instance, the adoption of the French Criminal Code 1810 (*Code penal*) in Western cantons as well as in Bern or with the impact of the German Criminal Code 1871 (*Strafgesetzbuch*) on the Eastern cantons like Zurich and Basel.

These phenomena reveal the evolutionary dynamics of Swiss legal culture since the late 18th century. Since that time, lawyers, judges, and legislators have in principle always been open to using foreign legal concepts as reference point for their own approach. Consequently, Swiss legal culture as a whole has never been dependent on individual foreign legal orders, but it has always been shaped by a multiplicity of foreign influences. In this regard, the aforementioned Swiss cultural diversity corresponds with the plurality of foreign influence, which has shaped and continues to shape the Swiss legal order of today.

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